

Nguyen (Migration) [2020] AATA 3891 (21 September 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Thi Nhu Thao Nguyen
CASE NUMBER:	1807275
HOME AFFAIRS REFERENCE(S):	BCC2017/1575264
MEMBER:	Donna Petrovich
DATE:	21 September 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 visa: • cl.820.211(2) of Schedule 2 to the Regulations

Statement made on 21 September 2020 at 1:18pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – natural justice – circumstances beyond applicant’s control – hearing postponed because of COVID-19 – death of sponsor – relationship assessed as at times of application and original hearing date – genuine and continuing relationship until sponsor’s death – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2), 65, 368

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cl 820.211(2)(d)(ii)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act). The applicant applied for the visa on 2 May 2017. The delegate refused to grant the visa on 12 March 2018.
2. The delegate made the decision on the basis that there was lack of evidence provided that applicant and her former Husband in Vietnam would not reunite in the future, and the Delegate was concerned about the sudden relationship and marriage of the Applicant and the Sponsor, and that insufficient evidence, and material was not provided as required to satisfy a criterion for the grant of the visa under the Migration Regulations 1994 (the Regulations).
3. The applicant appeared before the Tribunal on 15 September 2020 to give evidence and present arguments.
4. The applicant and sponsor had provided significant evidence prior to the hearing, which was initially to be heard on 15 April 2020, but was cancelled due to COVID-19, and was rescheduled and heard remotely on 15 September 2020. Tragically, the sponsor passed away on the 13 June 2020, after being diagnosed with cancer.
5. The Tribunal received extensive documentation prior to the hearing including a Deposit for a Property in the joint names of Stanley Raymond Godden (sponsor) and Thi Nhu Thao Nguyen (applicant) for the property at Cranbourne North, of \$47,500.00; a relationship statement detailing the applicant being made a full time employee of Tilley's Soaps on the 1 May 2019; bank details of \$10,000 borrowed from Thao's parents to purchase a vehicle to enable Ms Nguyen to drive to work independently and details of the this money being repaid until December 2017; details of money borrowed from Thao's parents for \$100,000 and the deposit on the house in January 2018, and Settlement in April 2018; bank home loan documents from Macquarie Bank in joint names; a statutory declaration dated 21 Feb 2018 for borrowing \$100,000 from Thao's parents for the purpose of purchasing a home in joint names; an offset account in joint names containing \$20,000; a Contract of Sale for the house at Cranbourne North in joint names and dated 22 January 2018; photos of daily life and outings detailing social activities and the couple enjoying household activities and sharing fun together, from 2017, 2018, and 2019; statutory declarations from friends Phillip Walker, Adam Ciccotelli, David Presse, Gabrielle Ead, and Hong Nguyen detailing the couple's relationship, work life and the applicant's role as the sponsor's caregiver and a copy of the sponsor's death Certificate, on which the applicant is named as his spouse, and 13 June 2020.
6. In light of the new evidence received, the Tribunal is satisfied that the criterion is met and has concluded that the matter should be remitted for reconsideration.

7. Written Statement of Decision

8. To fulfill the Tribunal's obligation under s.368 of the Migration Act, the following written statement is provided. While the statement sets out the Tribunals' decision, reasoning, and findings on material matters (including the evidentiary basis), in order to fully appreciate this decision a third party would need to listen to the audio from the public hearing and appraise the documentary evidence in the department and Tribunal case files.

9. The applicant applied for a temporary partner visa on 2 May 2017. If granted, the Department would again scrutinise the applicant's relationship with the sponsor after two years, with a view to considering whether, or not to grant the applicant the permanent visa. In this case, the Minister's delegate refused to grant the applicant the temporary visa on 12 March 2018. The Tribunal conducted a de novo (anew) review.

10. As part of the review, a public hearing was conducted via Teleconferencing as a result of COVID-19 conditions on 15 September 2020 and was provided with oral evidence from the applicant.

11. The decision on the review

12. Having considered the r.1.15A(3) matters, and after assessing the parties' relationship against s.5F(2)(a)-(d), this Tribunal is satisfied that the applicant and the sponsor at the time of application were: 'validly' married; had a mutual commitment to a shared life to the exclusion of all others; and were in a relationship which was genuine and continuing; and lived together. Accordingly, the Tribunal has been satisfied that at the time of application the applicant met cl. 820.211(2).

13. The Tribunal has considered the circumstances around the issue of time of decision; and concludes that if the hearing had proceeded as scheduled and not been cancelled as a result of COVID-19 requirements the (time of decision) requirements would have been met.

14. Sadly, the sponsor passed away on the 13 June 2020 after a sudden illness. The Tribunal is faced with the consideration of what decision would have been made on the scheduled day of hearing on 15 April 2020 prior to the sponsor's passing and substantiated by the volume and content of additional material provided by the applicant prior to this time.

15. As the circumstances around the postponement of the hearing were beyond the applicant's control, it would seem to be a denial of natural justice if the decision taken differed from that which would on the balance of probability have been made on the appointed hearing date in April 2020. As the applicant at this time continued to meet the time of decision criteria, the Tribunal finds that this condition is also met. This decision included a decision to apply the waiver of the requirement for the applicant to hold a substantive visa at the time she lodged her temporary partner visa. Accordingly, cl.820.211(2)(d)(ii) is met.

16. Reasons for the Decision

17. The Tribunal made a favourable decision in this case for the following reasons.

18. The applicant's and sponsor's provision of written and photographic material which depicted a joint financial commitment, evidence of a caring relationship to the exclusion of all others, and social interactions with friends at special events and occasions, and collaboration of the caring and loving nature of their relationship. This was supported by the provision of several statutory declarations which all provided collaborative evidence of the duration and nature of their relationship. The evidence was candid, consistent, and genuine.

19. Importantly, in this case there was evidence that the applicant provided support to her husband in relation to the health issues he experience in relation to his lung transplant, and then in his treatment for cancer and other issues around medication, and her assuming household responsibilities for many of the tasks her husband would previously have undertaken as a result of his illness. It was clear to the Tribunal at the hearing on the 15 September 2020 that the applicant was grieving the recent loss of her husband and her evidence was heartfelt, and that they had shared a happy life together, working at the same factory at Tilley's Soaps, and that they had provided each other with emotional support

during their relationship. The Tribunal is satisfied that the couple were in a genuine relationship of a longstanding nature.

20. It was also evident from the applicant's responses to the Tribunal's questions that the applicant had a desire to remain in Australia and was working hard to maintain the house that she and her husband shared as "the house had meant a lot to him".
21. Simply put, the Tribunal believes the applicant's claim, which is substantiated by the provision of ample written and photographic evidence of the true nature of the ongoing relationship that was.
22. The Tribunal also finds that if this matter had been heard on the set date, which was rescheduled because of COVID-19 restrictions, that the finding due to the compelling nature of the evidence received prior to the original hearing date would have supported a favourable finding.

23. The findings on material questions of fact – and the evidence

24. The applicant is a 42 year old woman from Vietnam. The applicant first came to Australia on a FA-600 visa on 18 November 2015 and returned to Vietnam in 4 February 2016. She returned to Australia on 5 February 2017 on a FA-600 visa. The applicant lodged an application for a Partner (Temporary) (Class UK) (subclass 820) visa on 2 May 2017. The applicant met the sponsor on the internet in October 2015 and they met in person in Australia on 22 November 2015 and were married on the 11 March 2017. The applicant had been separated from her previous husband for three years prior to her divorce and had moved from the family residence in Vietnam in 2014.
25. The applicant told the Tribunal that she had come to Australia and met her future husband and they continued their relationship on Viber talking almost every day. The records of this had been lost due to a phone malfunction and so there was no way to verify this for the Department, after the sponsor had plugged the phone into the car and the records were lost.
26. The applicant has two children from her previous marriage in Vietnam, they are currently living with her former husband and his sister. The relationship has become strained as her former husband has misrepresented her intentions to the children, and they are no longer in contact to the same degree as they were.
27. When asked about her husband's illness and recent passing, the applicant told the Tribunal that her desire was to stay in Australia and maintain the house which meant so much to her husband.
28. When asked if she was able to do this, she told the Tribunal that she was currently working 10 hour shifts at the factory where she and her husband had worked, and that they were very supportive of her. She explained that her husband had worked there for over 20 years and was well respected. When offered overtime, she also works on Saturdays to earn additional money.
29. The Tribunal heard that the couple had bought a house together, and that her husband did not want her to go back to Vietnam, that theirs was a genuine relationship, and their home was Australia.
30. The Tribunal heard from the applicant and her migration agent that the applicant was taking good care of her husband and that they were in love; that she had taken over the responsibility of caregiver and that she prepared his meals, made up and administered his

medication and assumed his responsibilities around the house; that, in spite of his lung replacement, the sponsor had a new lease on life, and no one had expected him to die.

31. The Tribunal heard that the sponsor was a long term employee of Tilley's Soap, and had been able to secure full time employment for his wife, and they had travelled to work together, and he had the habit of heating up her lunch for her and making sure she had her coffee. The couple have both contributed financially and to the chores around their home, they enjoyed simple outings and dinners together, cooking and growing their own vegetables in their own garden.
32. When the sponsor became ill, the applicant made sure his medication was collected and made up for him. They both provided statements in regard to their relationship and have a number of shared friends and acquaintances, as is evidenced by the 888 forms, and numerous statutory declarations. These statements speak at face value, to the perceived knowledge of the parties' relationship, if not its nature.
33. It is clear from the documentary and oral evidence that the applicant and sponsor drew emotional support and companionship from each other, and that they had a sound understanding of each other's lives, and their relationship was of an enduring nature.
34. The Tribunal finds that if the hearing had taken place as scheduled on 15 April 2020, that due to the compelling nature of the evidence provided previously and that which was provided by the applicant orally at the Hearing, that the findings would have been favourable to the applicant. The sudden passing of the applicant should not change the outcome in this case as his passing does not change the facts that the relationship was of a longstanding nature, they did share financial resources and had made a major financial commitment in the purchase of their home together, they clearly shared living arrangements and the responsibilities which go with that, they had mutual work friends and acquaintances and social activities and were well recognised as a couple within their own communities. They shared a caring and mutual relationship which was demonstrated by the couple and others in the submissions presented.

DECISION

35. The Tribunal remits the application for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 visa:
 - cl.820.211(2) of Schedule 2 to the Regulations

Donna Petrovich
Member